

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

STATE OF WASHINGTON,  
DEPARTMENT OF HEALTH,

Plaintiff,

v.

THE GEO GROUP, INC.,

Defendant.

CASE NO. C24-5639 BHS

ORDER

This matter is before the Court on its own motion. The Department of Health (DOH) filed this action in Thurston County Superior Court, seeking to enjoin the GEO Group, Inc., from denying it access to the Northwest ICE<sup>1</sup> Processing Center (the NWIPC) so that the agency may conduct an inspection under RCW 43.70.170. This state statute authorizes DOH to inspect any place containing a condition constituting a threat to the public health.

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<sup>1</sup> Immigration and Customs Enforcement.

1 GEO removed the action to this Court under the “federal officer” removal statute,  
 2 28 U.S.C. § 1442(a)(1). Dkt. 1, ¶ 9 (“[T]his case is removable on the grounds of federal  
 3 officer removal jurisdiction pursuant to 28 U.S.C. § 1442(a)(1).”).

4 A party seeking removal under § 1442(a)(1) “bears the burden of showing that (a)  
 5 it is a ‘person’ within the meaning of the statute; (b) there is a causal nexus between its  
 6 actions, taken pursuant to a federal officer’s directions, and plaintiff’s claims; and (c) it  
 7 can assert a ‘colorable federal defense.’” *Goncalves ex rel. Goncalves v. Rady Children’s*  
 8 *Hosp. San Diego*, 865 F.3d 1237, 1244 (9th Cir. 2017) (internal quotation marks omitted)  
 9 (quoting *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1251 (9th Cir. 2006)). At  
 10 least one federal district court has opined that, when determining whether a defense is  
 11 colorable under this statute, “[i]t is the sufficiency of the facts stated—not the weight of  
 12 the proof presented—that matters.” *Hagen v. Benjamin Foster Co.*, 739 F. Supp. 2d 770,  
 13 782–83 (E.D. Pa. 2010). Therefore, “a defense is colorable . . . if the defendant asserting  
 14 it identifies facts which, viewed in the light most favorable to the defendant, would  
 15 establish a complete defense at trial.” *Id.* at 783.

16 GEO asserts five federal defenses that it believes to be colorable: (1) that it is  
 17 entitled to “derivative sovereign immunity” against DOH’s claim under RCW 43.70.170,  
 18 Dkt. 1, ¶¶ 25–27; (2) that DOH’s attempt to inspect the NWIPC under this statute directly  
 19 regulates the federal government in violation of the intergovernmental immunity doctrine,  
 20 *id.* ¶¶ 28–29; (3) that DOH’s attempt to inspect the NWIPC under this statute  
 21 impermissibly discriminates against GEO in violation of the intergovernmental immunity  
 22 doctrine, *id.* ¶¶ 30–33; (4) that this statute is field preempted by ICE’s Performance

1 Based National Detention Standards (PBNDS), *id.* ¶¶ 34–36; and (5) that this statute is  
2 conflicted preempted, presumably also by the PBNDS. *Id.* ¶¶ 37–38.

3 After GEO removed this case, DOH filed a motion to preliminarily enjoin GEO  
4 from denying it access to the NWIPC so that it may inspect the facility under RCW  
5 43.70.170. Dkt. 7. DOH’s motion does not address whether GEO asserts a “colorable”  
6 federal defense to its state-law claim, although it contends that each of GEO’s federal  
7 defenses are meritless. *See id.* at 12–19.

8 The Court recognizes the need for urgency in addressing the issues in this case, but  
9 it also has “an independent obligation to determine whether subject-matter jurisdiction  
10 exists, even in the absence of a challenge from any party.” *Arbaugh v. Y&H Corp.*, 546  
11 U.S. 500, 501 (2006).

12 The Court is not persuaded that GEO asserts a colorable federal defense to DOH’s  
13 claim. In a separate order in a related case, the Court expressly rejected GEO’s  
14 “derivative sovereign immunity” defense as related to a different, yet similar, generally-  
15 applicable state safety and health law, RCW 49.17.070. *See* Dkt. 50 at 19–23, in *Dep’t of*  
16 *Labor and Indus. v. GEO Secure Serv., LLC*, No. C24-5095 BHS. The Court finds no  
17 reason why that reasoning does not apply here. The Court has also rejected, in another  
18 order, the apparent bases for GEO’s “direct regulation” intergovernmental immunity  
19 defense, field preemption defense, and conflict preemption defense. *See GEO Grp., Inc.*  
20 *v. Inslee*, \_\_\_ F. Supp. 3d \_\_\_, No. C23-5626 BHS, 2024 WL 1012888, at \*18–22 (W.D.  
21 Wash. Mar. 8, 2024). The Court similarly finds no reason why that reasoning does not  
22 apply here.

1 Finally, the Court is not presently persuaded that GEO asserts a colorable defense  
2 that RCW 43.70.170 impermissibly discriminates against GEO as the operator of the  
3 NWIPC. This statute authorizes DOH to “investigate, examine, sample or inspect *any*  
4 article or condition constituting a threat to the public health,” as that term is used in the  
5 statute. RCW 43.70.170 (emphasis added). “For purposes of such investigation, the  
6 secretary or the secretary’s representative shall at all times have free and unimpeded  
7 access to *all* buildings, yards, warehouses, storage and transportation facilities or *any*  
8 other place.” *Id.* (emphasis added).

9 In support of GEO’s impermissible discrimination defense, the notice of removal  
10 asserts that, “when faced with a true public health emergency associated with the  
11 worldwide COVID-19 pandemic, the DOH did not exercise its authority under RCW  
12 43.70.170 to investigate the deplorable conditions in Washington state prisons that  
13 resulted in at least 43 deaths in just one year.” Dkt. 1, ¶ 32. GEO accordingly argues that  
14 DOH’s “current attempt to enter the NWIPC to investigate alleged ‘public health  
15 concerns’ pursuant to RCW 43.70.170 imposes upon the federal government and those  
16 with whom it deals burdens and costs that comparable state or private entities do not  
17 bear.” *Id.* ¶ 33.

18 Again, RCW 43.70.170 is a generally applicable state safety and health law. On its  
19 face, it plainly does not discriminate against GEO as the operator of the NWIPC. The  
20 Court is not convinced that DOH’s application of this statute to state prisons during the  
21 COVID-19 pandemic—a circumstance that is not present here—supports a colorable  
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1 federal defense that DOH's attempt to inspect the NWIPC under this statute discriminates  
2 against GEO in violation of the intergovernmental immunity doctrine.

3 The sole issue in this case appears to be whether any of the complained of  
4 conditions at the NWIPC constitute a "threat to the public health," as that term is used in  
5 RCW 43.70.170. That is a state law issue, not a federal one.

6 GEO is accordingly **ORDERED** to **SHOW CAUSE** why this case should not be  
7 remanded to the Thurston County Superior Court. GEO shall file a brief addressing this  
8 issue on or before the end of business on Tuesday, August 27, 2024. That brief shall not  
9 exceed 15 pages. DOH may file a response brief, also not to exceed 15 pages, on or  
10 before the end of business on Tuesday, September 3, 2024. No reply brief is necessary.

11 Pending resolution of whether this Court has subject matter jurisdiction over this  
12 case, DOH's motion for a preliminary injunction, Dkt. 7, is **TERMINATED**. If  
13 jurisdiction is established, the Court will re-note that motion and set a briefing schedule  
14 for response and reply briefs.

15 **IT IS SO ORDERED.**

16 Dated this 19th day of August, 2024.

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19 BENJAMIN H. SETTLE  
20 United States District Judge  
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